

**Letter of Findings: 10-0249**  
**Gross Retail Tax**  
**For the Years 2007 and 2008**

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**ISSUE**

**I. Gross Retail Tax – Imposition.**

**Authority:** IC § 6-2.5-1-1 et seq; IC § 6-2.5-2-1; IC § 6-2.5-1-5; IC § 6-8.1-5-1; [45 IAC 2.2-4-1](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Commissioner's Directive 23 (April 2004).

Taxpayer protests the imposition of the Gross Retail (sales) Tax on delivery charges.

**STATEMENT OF FACTS**

Taxpayer is an Indiana promotional advertising company. Pursuant to an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer failed to collect sales tax on delivery charges. The Department's audit also determined that Taxpayer failed to obtain exemption certificates on some of the sales which Taxpayer alleged to be exempt. As a result, the Department's audit assessed Taxpayer additional sales tax and interest.

Taxpayer only protests the imposition of sales tax on delivery charges. A hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

**I. Gross Retail Tax – Imposition.**

**DISCUSSION**

The Department's audit assessed Taxpayer sales tax on the delivery charges. Taxpayer, to the contrary, maintained that the delivery charges were not subject to sales tax.

All tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes a sales tax on retail transactions and a complementary use tax on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-1-1 et seq.

IC § 6-2.5-2-1 provides:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

[45 IAC 2.2-4-1](#) further illustrates:

- (a) Where ownership of tangible personal property is transferred for a consideration, it will be considered a transaction of a retail merchant constituting selling at retail unless the seller is not acting as a "retail merchant".

**(b) All elements of consideration are included in gross retail income subject to tax. Elements of consideration include, but are not limited to:**

**(1) The price arrived at between purchaser and seller.**

**(2) Any additional bona fide charges added to or included in such price for preparation,** fabrication, alteration, modification, finishing, completion, **delivery**, or other services performed in respect to or labor charges for work done with respect to such property prior to transfer.

**(3) No deduction from gross receipts is permitted for services performed or work done on behalf of the seller prior to transfer of such property at retail.**

IC § 6-2.5-1-5, in pertinent part, provides:

- (a) Except as provided in subsection (b), "gross retail income" means the total amount of consideration, including cash, credit, property, and services, for which tangible personal property is sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for:

- (1) the seller's cost of the property sold;
- (2) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller;
- (3) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges;
- (4) delivery charges; or**
- (5) consideration received by the seller from a third party if:

- (A) the seller actually receives consideration from a party other than the purchaser and the consideration is directly related to a price reduction or discount on the sale;
- (B) the seller has an obligation to pass the price reduction or discount through to the purchaser;
- (C) the amount of the consideration attributable to the sale is fixed and determinable by the seller at the time of the sale of the item to the purchaser; and
- (D) the price reduction or discount is identified as a third party price reduction or discount on the invoice received by the purchaser or on a coupon, certificate, or other documentation presented by the purchaser.

For purposes of subdivision (4), **delivery charges are charges by the seller for preparation and delivery of the property to a location designated by the purchaser of property**, including but not limited to transportation, **shipping, postage**, handling, crating, and packing. (**Emphasis added**).

Commissioner's Directive 23 (April 2004), which supersedes Commissioner's Directive 22 (January 2004), specifically addresses the issue concerning taxability of delivery and installation charges. Commissioner's Directive 23, in relevant part, states:

## II. STATUTORY CHANGES

P.L. 257-2003 amended [IC 6-2.5-1-5](#) concerning the definition of "gross retail income". That amendment included delivery and installation in the definition of gross retail income. HEA 1365-2004 removed installation from the definition of gross retail income and amended [IC 6-2.5-4-1](#) to state that the transfer of tangible personal property in a retail transaction does not take place until after delivery.

## III. DELIVERY CHARGES

Delivery charges are included in gross retail income and subject to tax regardless of shipping terms. **Delivery that is made by or on the behalf of the seller of tangible personal property will be taxable whether or not the delivery charge is separately stated.**

A. Delivery charges billed and furnished by a third party are exempt.

Example #1 – A company purchases a piece of equipment from the manufacturer. The purchasing company hires a trucking company to pick up the piece of equipment at the manufacturer's facility and deliver it to purchaser's location. The shipping charges are not subject to sales tax because they are not included in a retail transaction.

B. If the tangible personal property that is sold is not subject to sales tax because of an available exemption, then the delivery charges will not be subject to sales tax.

Example #2 – An office supply retailer purchases 500 ballpoint pens from a wholesaler for \$1,000. The wholesaler charges the purchaser \$100 to deliver the pens to the purchaser. The purchaser issues an exemption certificate to the wholesaler indicating that the pens are being purchased for resale. The entire \$1,100 charge is exempt from sales tax.

C. Separately stated charges for delivery of prepared food beyond the seller's location are subject to sales tax.

Example #3 – A pizza parlor imposes a \$3.00 charge to deliver pizzas to customer's residence. The \$3.00 charge is subject to sales tax. (**Emphasis added**).

In this instance, Taxpayer stated that it has maintained the same business practice including the method of delivery and invoicing its customers since 1983. Taxpayer further stated that, in 1991, the Department issued a Letter of Findings (LOF) which sustained Taxpayer's protest on the delivery charges and determined that the delivery charges were not subject to Indiana sales tax. Taxpayer thus believes that the Department's current proposed assessment is not correct. To support its protest, in addition to a sample copy of purchase order and invoice, Taxpayer submitted a copy of the 1991 LOF, which sustained Taxpayer's protest on the delivery charges.

Taxpayer is mistaken. As stated above, due to the change in legislation in 2004, the delivery charges are subject to Indiana sales and/or use tax unless the delivery charges are billed and furnished by a third party. Taxpayer's documentation merely showed that the charge of "ship" was separately stated on its invoice. Taxpayer, however, did not provide any documentation demonstrating that the delivery charges were billed and furnished by a third party. Given the totality of the circumstances and in the absence of other documentation demonstrating otherwise, the Department is not able to agree that Taxpayer has met its burden of proving that the assessment is incorrect.

In short, Taxpayer charges its customers for delivering the products. The transfer of tangible personal property in the retail transaction does not take place until after delivery. As a result, the delivery charges are included in the retail transaction and are subject to sales tax. Thus, Taxpayer, as a retail merchant, must collect the sales tax.

## FINDING

Taxpayer's protest is respectfully denied.

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